

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
DAVID WYCOFF, ESQ.	
On behalf of the Petitioner	3
RONALD EISENBERG, ESQ.	
On behalf of the Respondent	27
REBUTTAL ARGUMENT OF	
DAVID WYCOFF, ESQ.	
On behalf of the Petitioner	52

1 P R O C E E D I N G S

2 (11:04 a.m.)

3 JUSTICE STEVENS: We'll hear argument in Pace
4 against the -- the warden.

5 Mr. Wycoff.

6 ORAL ARGUMENT OF DAVID WYCOFF

7 ON BEHALF OF THE PETITIONER

8 MR. WYCOFF: Justice Stevens, and may it please
9 the Court:

10 Mr. Pace, at age 17, was sentenced to life
11 without possibility of parole after being misled by his
12 lawyer and the court.

13 His right to Federal habeas review depends
14 entirely upon whether his State post-conviction
15 proceedings tolled the AEDPA statute of limitations. This
16 Court should --

17 JUSTICE O'CONNOR: Well, he -- he had a prior
18 round of hearings at the State level on these same claims,
19 did he not?

20 MR. WYCOFF: On different claims, Your Honor.
21 He had a first, a -- under what was called the PCHA in
22 Pennsylvania. The tolling question here is whether the
23 PCRA petition --

24 JUSTICE O'CONNOR: I know, but the substance of
25 it, saying it isn't fair to give me life without parole

1 because of what happened, I didn't understand the plea --
2 he raised that in State court before.

3 MR. WYCOFF: He raised it in the first
4 proceeding an ineffective --

5 JUSTICE O'CONNOR: Yes.

6 MR. WYCOFF: -- assistance of counsel claim --

7 JUSTICE O'CONNOR: Yes.

8 MR. WYCOFF: -- related to that and some other
9 claims related to that --

10 JUSTICE O'CONNOR: Right.

11 MR. WYCOFF: -- in the second proceeding.

12 JUSTICE O'CONNOR: And he -- he essentially
13 wants to relitigate the substance of those previous
14 claims.

15 MR. WYCOFF: No, Your Honor. He actually -- the
16 first petition raised only an ineffectiveness claim. The
17 second petition raised a due process challenge to the
18 colloquy, which was not exhausted in the first, raised new
19 evidence to support the claim which Pennsylvania law
20 allowed him to do, and raised a constitutional and State
21 law challenge to the legality of his sentence. There were
22 new claims in the second proceeding.

23 JUSTICE GINSBURG: -- of both claims was,
24 however he dressed it up in -- in due process, that I
25 wasn't told at the time of my sentencing that life meant

1 life without parole. That was the essence, the core of
2 his complaint the first time around, wasn't it?

3 MR. WYCOFF: Yes, that his lawyer misled him was
4 the first claim, that by telling him he'd be out in 10 to
5 15 years.

6 JUSTICE GINSBURG: But the -- but the essence of
7 it was I wasn't told that life meant I would never get out
8 of prison.

9 MR. WYCOFF: Yes, Your Honor.

10 JUSTICE GINSBURG: Both times.

11 MR. WYCOFF: In -- in the second he raised that
12 plus that the colloquy itself was defective and that the
13 sentence, the life without parole sentence, was illegal
14 and unconstitutional, apart from the misinformation
15 aspect. So they were different claims.

16 Let me start with statutory tolling. Section
17 2244(d)(2) of AEDPA provides tolling during properly filed
18 applications for State post-conviction review. Under this
19 Court's unanimous decision in Artuz, Mr. Pace's PCRA
20 petition was properly filed. In fact, the PCRA time bar
21 functions in all material ways like the New York State
22 procedural bar rules at issue in Artuz.

23 Now, Artuz also identified some types of rules
24 that would prevent an application from being properly
25 filed, for example, the AEDPA successive bar which makes

1 you go to the court of appeals first and get permission
2 before you can actually file in the district court, and it
3 has a screening mechanism to make sure that only petitions
4 with a prima facie chance get filed.

5 The PCRA time bar is nothing like that at all.
6 It's like the State court procedural bar rules in Artuz.
7 There's no condition to filing. You can go and file at
8 any time. The court, as a matter of law, has to take your
9 petition, has to give it judicial review -- yes, Your
10 Honor.

11 JUSTICE GINSBURG: Mr. Wycoff, are you taking
12 the position that this -- that Artuz -- I thought,
13 frankly, that Artuz had classified within properly filed
14 timely filed and then had a footnote, and it says that
15 there might be some exceptions to a timely filing rule --

16 MR. WYCOFF: Yes, Your Honor.

17 JUSTICE GINSBURG: -- rule. And they're not
18 taking a position about that. But you quickly said this
19 time limitation falls under the procedural bar label.

20 MR. WYCOFF: I'm sorry, Your Honor. Yes. This
21 -- Artuz said that a time limit without exception, say, in
22 30 days you must file in 30 days, no exception, or in 1
23 year, no exceptions -- that's what Artuz called a
24 condition to filing and that you're either in or you're
25 out in that rule.

1 And Artuz, though, reserved the question
2 presented here of whether a time bar with exceptions, like
3 the PCRA time bar -- whether that could be properly filed.
4 And so obviously, Artuz reserved the exact question here.
5 But what -- the analysis of Artuz controls here and shows
6 that this petition was properly filed.

7 JUSTICE SCALIA: Well, it depends on what the
8 exceptions are. If -- if -- as -- here I understand there
9 are three exceptions.

10 MR. WYCOFF: Yes, Your Honor.

11 JUSTICE SCALIA: And they're all spelled out in
12 the statute.

13 MR. WYCOFF: They're similar to the AEDPA
14 exceptions.

15 JUSTICE SCALIA: Yes. And -- and if you do not
16 plead any of those exceptions when you -- when you file,
17 it seems to me it's not properly filed.

18 MR. WYCOFF: Well, there are a couple of
19 responses to that, Your Honor. First of all, in -- in
20 terms of Mr. Pace, the Pennsylvania Supreme Court has said
21 it wasn't at all clear before, roughly, December of 1999
22 that you actually need to plead those exceptions in your
23 petition. Now they say you should plead them in your
24 petition, but at the time it wasn't clear. Certainly the
25 -- the form that the prison provides --

1 JUSTICE SCALIA: I don't care what the
2 Pennsylvania law is. I mean, it -- it seems to me if you
3 have a statute that says it's untimely unless one of these
4 three exceptions apply, and -- and you -- you simply file
5 and you don't say -- and it's clearly out of time without
6 one of the exceptions, and you simply file and don't say
7 but this exception applies, it seems to me that's not
8 properly filed, whatever the rule in -- in Pennsylvania
9 was.

10 MR. WYCOFF: If -- in terms of -- to go to
11 Artuz' analysis, you would have to look at each -- the
12 exceptions are -- go claim by claim. You would have to
13 look at each claim and see did you plead the exception for
14 this claim, yes or no; this claim, yes or no. So again --

15 JUSTICE SCALIA: But you haven't pleaded any of
16 them, none at all. You just file it --

17 MR. WYCOFF: In that case --

18 JUSTICE SCALIA: -- several years out of time.
19 You -- you make no assertion that any one of the -- of the
20 three specific exceptions applies. I don't see how that
21 could possibly be considered properly filed.

22 MR. WYCOFF: Because the court still accepts it,
23 reviews it to see if any of the exceptions apply.

24 JUSTICE SCALIA: Ah, that -- that's your theory
25 that -- that --

1 MR. WYCOFF: And -- I'm sorry.

2 JUSTICE SCALIA: Unless it can be rejected by
3 the clerk --

4 MR. WYCOFF: Not at all, Your Honor. It's not
5 that -- that theory at all. In -- in Pennsylvania, the
6 court accepts it and gives it judicial review and reviews
7 it claim by claim to see if any of the exceptions apply.

8 JUSTICE SCALIA: But you haven't made the claim.

9 MR. WYCOFF: Well, that's what the court would
10 determine. And presumably in a case like that, the court
11 would be able to dispose of it quickly and --

12 JUSTICE KENNEDY: What -- what does the
13 Pennsylvania court -- law now say with respect to claim-
14 by-claim pleading of the exceptions?

15 MR. WYCOFF: The Pennsylvania Supreme Court now
16 has said you should plead in the PCRA petition the
17 exceptions.

18 JUSTICE KENNEDY: Claim by claim?

19 MR. WYCOFF: For each -- any claim that you're
20 raising, yes. It goes claim by claim.

21 JUSTICE BREYER: This problem couldn't arise
22 again in Pennsylvania, couldn't it, because they have a 1-
23 year statute of limitations? So there would be no way
24 that you could be untimely filing within the 1 year that
25 you have to go to Federal court.

1 MR. WYCOFF: It -- it can arise again, Your
2 Honor, and that --

3 JUSTICE BREYER: It can? How could it --

4 MR. WYCOFF: Yes, it can arise again and -- and
5 will many times arise again because consider someone who's
6 already had his or her AEDPA year pass and then discovers,
7 say, a Brady claim and wants to go back and litigate that.
8 Under AEDPA, you would have a year to get back into court
9 with that.

10 JUSTICE BREYER: You do. I thought AEDPA you
11 had to file within a year.

12 MR. WYCOFF: Yes.

13 JUSTICE BREYER: And then if you miss the year,
14 you're out of luck. Period.

15 MR. WYCOFF: That's -- yes, but under State law,
16 you only have 60 days to get that. So someone in
17 Pennsylvania who finds a Brady claim, say, has to get back
18 into State court within 60 days of discovering that. So
19 his -- he -- he could go into State court --

20 JUSTICE BREYER: I see. So in other words, he
21 -- his conviction is final.

22 MR. WYCOFF: Yes.

23 JUSTICE BREYER: 60 days runs after his final
24 conviction and then between the 60th day and the 365th
25 day, he has discovered his Brady claim and has not got

1 into court within 60 days.

2 MR. WYCOFF: Or he finds it in what he thinks is
3 within 60 days of when he should have found it. He files
4 his State post-conviction application. After years of
5 litigation, the court says, you know, you really should
6 have found it 59 days ago, not 60.

7 JUSTICE BREYER: And Justice Scalia's question
8 -- I'm interested in this. It couldn't arise. That is, a
9 person who files his State collateral petition more than
10 365 days after the finality of the State court direct
11 review, that person is out of luck under anybody's
12 interpretation because more than a year has passed since
13 it became final, i.e., the State direct review. Am I
14 right or wrong about that? That's what's puzzling me.

15 MR. WYCOFF: It -- it depends on if there's a
16 new -- if -- if there has not been a new triggering date,
17 other than the finality for the AEDPA date, then you will
18 be out of time for AEDPA.

19 JUSTICE GINSBURG: But AEDPA -- it doesn't say 1
20 year and that's it. AEDPA has exceptions.

21 MR. WYCOFF: Yes, it does, Your Honor.

22 JUSTICE BREYER: The exemptions still could be
23 the problem.

24 MR. WYCOFF: Yes. And in fact, everyone now who
25 has, say, a Brady claim is going to have -- under Third

1 Circuit law as it is now, is going to have to come into
2 Federal court and file a protective habeas petition
3 because the odds are very likely that more than a -- the
4 AEDPA year is going to run while they litigate this.

5 JUSTICE KENNEDY: Yes. We would have to breathe
6 life back into the stay and abey --

7 MR. WYCOFF: Yes, Your Honor.

8 JUSTICE KENNEDY: But let me ask you this.
9 Returning to our earlier discussion about pleading a
10 specific exemption --

11 MR. WYCOFF: Yes.

12 JUSTICE KENNEDY: -- are there States, do you
13 know, where that is not required and the State court will
14 go through the exceptions even if you haven't pled them?

15 MR. WYCOFF: Well, Pennsylvania actually does
16 that and certainly did it at the time Mr. Pace was
17 litigating.

18 JUSTICE KENNEDY: Well, but I thought you said
19 Pennsylvania law had changed now.

20 MR. WYCOFF: They have said now you should plead
21 them at the petition -- in the petition.

22 JUSTICE KENNEDY: But my -- my question is do
23 you know if there are other States where they say, we
24 don't care if you plead these --

25 MR. WYCOFF: I --

1 JUSTICE KENNEDY: -- exemptions specifically or
2 not? We're going to look through it and find it for
3 ourselves.

4 MR. WYCOFF: I -- I don't know the answer to
5 that. I know that was the practice. In -- in fact,
6 Pennsylvania courts still do that.

7 JUSTICE SCALIA: And you say that if that's the
8 case, you can file a -- a State -- a State claim that is
9 plainly no good and until the State court finally gets
10 around to -- to telling you that it's no good, your --
11 your AEDPA claim is tolled.

12 MR. WYCOFF: Yes, while you're -- and the State
13 could easily prevent that by setting up some kind of
14 prefiling requirement for --

15 JUSTICE GINSBURG: But that's, in -- in effect,
16 saying that there is no -- that the properly filed, given
17 the Pennsylvania procedure, does not include timely filed.

18 MR. WYCOFF: The -- the question of whether it
19 was timely or not is not actually determined until the end
20 of the litigation.

21 JUSTICE GINSBURG: But -- but you have just said
22 that the -- the court will look on its own to see if there
23 are these exceptions.

24 MR. WYCOFF: Yes, Your Honor.

25 JUSTICE GINSBURG: So that there would be no

1 case of an untimely filing in this period when the court
2 was -- even if you raised no exception, was going through
3 them.

4 MR. WYCOFF: Yes.

5 JUSTICE GINSBURG: There would be no case in
6 which an untimely filing would be included in properly
7 filed because the very fact that the court itself would go
8 through the petition to look for exceptions would take it
9 out of the category.

10 MR. WYCOFF: Yes, Your Honor, and exactly the
11 same could be said about Artuz, the procedural bar rules
12 in Artuz, whether someone pled --

13 JUSTICE GINSBURG: But the -- the difference was
14 that Artuz ranked timely filing as an ingredient of
15 properly filed, and you say but not in Pennsylvania the
16 way it's set up. Timely filing is not an ingredient of
17 properly filed.

18 MR. WYCOFF: Because the State court lets you
19 file it and gives it judicial review and applies it claim
20 by claim.

21 JUSTICE SOUTER: But don't -- don't you have a
22 -- a -- sort of a second prong to -- to your response?
23 And I -- I wanted to get into this. You -- you have said
24 Pennsylvania will let you file even though ultimately it,
25 you know, may well determine that you -- you were out of

1 time and you don't fall within any of the exceptions.

2 Well, that's -- that's an answer. I'm not sure it's a
3 strong enough answer to respond to Artuz.

4 But I thought you had a second part to the
5 answer, and I thought your second part to the answer was
6 in that kind of situation, the Third Circuit practice, the
7 Third Circuit rule is that unless we go through the
8 Pennsylvania process, even if we know from day one that
9 we're out of time, we think we have a -- an excuse, but
10 even though we -- we think from day one we're out of time,
11 unless we exhaust the Pennsylvania process, they will
12 throw us out for nonexhaustion. And the reason they will
13 throw us out from nonexhaustion, as opposed to going
14 directly to the question whether there is an excuse for
15 nonexhaustion, is because Pennsylvania will actually let
16 us litigate this --

17 MR. WYCOFF: Yes.

18 JUSTICE SOUTER: -- and not determine it as a
19 threshold matter.

20 So -- so your answer, as I understand it, is
21 Pennsylvania let's you litigate it, and the Third Circuit
22 requires you to litigate it so that the only reasonable
23 thing for us to do is to litigate it even if you may say
24 in the abstract it's a purely threshold time question.
25 And for that reason, there should be tolling. Isn't that

1 your argument?

2 MR. WYCOFF: Yes, Your Honor. And it's -- it's
3 connected to the statutory language. AEDPA says we'll
4 toll for properly filed applications. That -- AEDPA is
5 keyed to how much process the State post-conviction courts
6 will give you. In a -- in a State where they say anyone
7 who comes after a year, we won't give you any review and
8 you're just out of court, AEDPA says when -- that's not --
9 we're not going to consider that properly filed. We won't
10 toll, but --

11 JUSTICE SCALIA: This is putting such a -- I
12 mean, the system is not going to work. It -- it's a rare
13 State system that has an absolute statute of limitation
14 with no exceptions. You're almost going to have to
15 inquire into exceptions. So you're saying this is a way
16 to avoid -- avoid AEDPA endlessly, just keep filing claims
17 that are out of time, and until the court finally gets
18 around to saying it's out of time, your -- your AEDPA time
19 is tolled --

20 MR. WYCOFF: Well --

21 JUSTICE SCALIA: -- by which time you file
22 another one that's clearly out of time. And until that
23 one is resolved -- I -- this couldn't be what AEDPA was --
24 was meant to establish.

25 JUSTICE KENNEDY: And -- and if you're tempted

1 to answer, well, people want to get out so they're not
2 going to sit around forever, then we'd ask you what about
3 the death cases.

4 MR. WYCOFF: Okay, and that was what I was
5 tempted to answer, and since you said it, I'll go straight
6 to the death cases.

7 In Pennsylvania, certainly there's no -- a
8 death-sentence prisoner can get nowhere by filing what he
9 knows to be an untimely PCRA petition because Pennsylvania
10 law requires the Governor to sign warrants when the
11 conviction is final and then at every break in the
12 litigation basically after that. And the PCRA courts
13 cannot grant a stay of execution until after they find
14 that the petition is both timely and meritorious. So it's
15 not --

16 JUSTICE KENNEDY: I'm not sure that would apply
17 to other States.

18 MR. WYCOFF: That's true. And I mean, each
19 State can set up a system to -- to satisfy its needs.
20 Pennsylvania could set up a system like the AEDPA
21 successor bar to say you're not going to be filed at all
22 until we give you permission.

23 JUSTICE KENNEDY: Under your rule that filing is
24 sufficient, are there any instances of -- of frivolous
25 petition where your rule would not apply?

1 MR. WYCOFF: Well, I think all the courts of
2 appeal that have -- have talked about that have thought --
3 have said that you really shouldn't start figuring out
4 whether it was a frivolous assertion or meritorious --

5 JUSTICE KENNEDY: Well, then Justice Scalia's
6 prediction is -- is right. You just keep filing and
7 filing.

8 MR. WYCOFF: Presumably you could and if there's
9 someone who wants to do that, which is going to be a
10 rare --

11 JUSTICE BREYER: Suppose you lost on that one.
12 Suppose that you wanted some kind of a -- suppose that the
13 majority wanted a standard that would prevent absolutely
14 frivolous filings on the basis of -- of statute of
15 limitations. Would you -- what standard would -- what --
16 what's our choice of standards there? Could we -- one,
17 obviously, that the prisoner has to be in good faith.
18 Another could be he has to be in good faith and there has
19 to be a reasonable argument that it hasn't run. Maybe
20 there are others that you've thought of.

21 MR. WYCOFF: I think that going down that path
22 is going to open up just a nightmare of -- of litigation
23 in Federal court about -- if you start talking about good
24 faith and are you -- if the State courts deny it, can you
25 still say it was nonfrivolous? I think all the courts

1 just across the board have tried to avoid that type of
2 thing.

3 JUSTICE SCALIA: Try -- try this simple rule.
4 Where you're dealing with a statute of limitations that
5 has exceptions, it's not properly filed if you do not
6 assert the existence of one of those exceptions.

7 MR. WYCOFF: Two -- I have two things to say
8 about that. One is it creates a problem with Artuz
9 because that type of rule -- assuming the exceptions are
10 like the PCRA exceptions which go claim by claim, that's a
11 claim-by-claim rule which would then create the anomaly
12 that Artuz shied away from, that you look to whether it
13 was a properly filed application, not to whether it was an
14 application with properly filed claims.

15 The second point is that -- is that for Mr.
16 Pace, whatever the merits of that rule may be going
17 forward, it -- it can't be used against Mr. Pace because
18 there was no such requirement in Pennsylvania. I mean,
19 presumably the -- I assume the Federal courts are not
20 going to make up this rule, that it's going to be up to
21 the State courts to say what their filing --

22 JUSTICE SCALIA: Why -- why not? We make up a
23 lot of stuff.

24 (Laughter.)

25 MR. WYCOFF: Well, Artuz talks about you look to

1 the State's procedural filing requirements. This is a
2 Federal statute and properly filed is given a Federal
3 meaning, but you presumably look to the State filing
4 requirements, as you did in Artuz, to determine what that
5 means.

6 Now, all of these concerns about delay and so on
7 are the exact same concerns, where there in Artuz someone
8 could file successive petition after successive petition
9 in New York if they want to delay. It's just not -- it's
10 not a -- it's certainly not a problem for noncapital
11 cases.

12 JUSTICE SCALIA: I thought the whole purpose of
13 AEDPA was -- was to prevent delay. I mean, that's --
14 that's what's -- it seems to me counter-intuitive about
15 the position you're -- you're urging upon us. Here is a
16 statute that was meant to stop these things from dragging
17 on endlessly.

18 MR. WYCOFF: Yes.

19 JUSTICE SCALIA: And you tell us don't worry
20 about these things dragging on endlessly.

21 MR. WYCOFF: I'm not -- I'm saying AEDPA says
22 come to Federal court within a year. We'll toll when
23 you're in State court if it's properly filed. Properly
24 filed, if the States let you file a lot of stuff, we're
25 going to -- comity requires to allow that, and we'll toll.

1 If the States don't --

2 JUSTICE SCALIA: That's unrealistic if the
3 States allow you to file a lot of stuff. You're -- you're
4 saying the only way the States can stop this thing from
5 going on and on and on is to adopt an absolute rigid
6 statute of limitations, no exceptions.

7 MR. WYCOFF: That's one way or a prefiling
8 requirement.

9 JUSTICE SCALIA: Give me another way.

10 MR. WYCOFF: The AEDPA prefiling requirement
11 where you go to the court and you say, I'd like to file
12 this petition, tell me if I can, and the court says, 30
13 days later, yes or no. That's --

14 JUSTICE KENNEDY: Oh, but if it takes a year a
15 later, then we --

16 MR. WYCOFF: Well, yes. If -- the AEDPA --

17 JUSTICE KENNEDY: Then you just repeat the
18 process one step backward.

19 MR. WYCOFF: No, Your Honor. I think the courts
20 are -- are -- the Federal courts are capable of telling
21 the difference between an application for State post-
22 conviction relief on the one hand and a motion for leave
23 to file an application on the other hand. In fact, the
24 Seventh Circuit in -- in the Smith v. Walls case and the
25 Tinker v. Ward case that we cited in our brief had exactly

1 that distinction between an Indiana rule which had a
2 prefiling requirement and an Illinois rule --

3 JUSTICE BREYER: What about a -- a rule
4 requiring good faith or reasonable argument in death
5 cases? In all the other cases, there's no incentive to do
6 this endless filing, and in death cases, there is. So in
7 those death cases, we would insist that it is not properly
8 filed if it's out of time unless the prisoner in good
9 faith and with a plausible argument, a reasonable argument
10 thought it was in time.

11 MR. WYCOFF: I suppose that -- I mean, that
12 could be a construction of the statute as long as you let
13 people -- people are going to come to Federal court first
14 and get -- for stay abeyance if you do that. If you don't
15 know until the outcome years later whether you were
16 tolling or not, that's going to cause everyone to file
17 protective filings.

18 JUSTICE SCALIA: Do you think that's a
19 reasonable interpretation of properly filed and -- and
20 what I proposed to you is not a reasonable interpretation
21 of properly filed?

22 MR. WYCOFF: Well, I was just --

23 JUSTICE SCALIA: How can you -- how can you
24 tease that elaborate system out of -- out of the words
25 properly filed but you cannot tease out of it --

1 MR. WYCOFF: The --

2 JUSTICE SCALIA: -- simply showing on its face
3 that there's either an absolute statute or that one of the
4 exceptions to the statute exists?

5 MR. WYCOFF: The problem with that in terms --
6 is that it conflicts with Artuz' idea that the -- any rule
7 that's a condition to filing has to go to the application
8 as a whole.

9 JUSTICE BREYER: Well, I don't think it actually
10 -- I mean, in -- I think they're about equal, aren't they,
11 in respect to language? And the argument against the
12 other one is that prisoners are going to get mixed up
13 about it. They -- they don't know exactly what they're
14 supposed to put. The argument against the one I proposed
15 is it adds complexity of decision-making. Sort of between
16 the two, it's rather hard to see.

17 MR. WYCOFF: Just --

18 JUSTICE BREYER: They each have their problems.

19 MR. WYCOFF: Just in terms of -- of policy, I
20 think any rule you adopt that's not mechanical and doesn't
21 let people know on the front end whether they're tolling
22 or not, there's going to be floods of protective filings.

23 Now, the -- the rule like -- a rule which is --
24 which -- where they know going in and whether they're
25 going to be tolled or not, then they can say plead --

1 litigate in State court becoming -- before coming to
2 Federal court. And Duncan v. Walker was very clear that
3 the court doesn't want lots of people filing prematurely.

4 If I could, I'd like to turn to equitable
5 tolling.

6 As Chief District Judge Giles found, that it
7 would be an extraordinary deprivation of rights and
8 patently unfair to deny tolling in Federal review here, he
9 found -- Judge Giles found that if Mr. Pace had filed a
10 Federal habeas petition instead of his PCRA petition,
11 Judge Giles would have dismissed it and required him to do
12 exactly what he did, which is to seek State remedies under
13 the PCRA. As Judge Giles found, Mr. Pace acted diligently
14 and appropriately under the circumstances.

15 It seems this is a clear case for equitable
16 tolling. This is a case where --

17 JUSTICE SCALIA: The circumstances included the
18 fact that he sat on this thing for 3 years. He could have
19 brought it 3 years earlier, couldn't he?

20 MR. WYCOFF: You're talking about the time from
21 the first PCRA --

22 JUSTICE SCALIA: The claim, yes, that's right.

23 MR. WYCOFF: Yes, Your Honor.

24 JUSTICE SCALIA: So -- when -- when you -- when
25 you fold that into the circumstances, it doesn't seem to

1 me an overwhelming case for equitable tolling.

2 MR. WYCOFF: I have, I think, four responses to
3 that.

4 First, Mr. Pace was not sitting on his hands for
5 these 4 years. This is a man who entered prison at age
6 17, barely educated, barely literate, drug-addled. This
7 is not someone who was prepared to litigate on his own
8 when he came into prison. This is someone who -- whose
9 legal papers were destroyed by the prison. This is
10 someone who was without counsel for that entire time that
11 you're talking about. This is someone who had very
12 limited access to a law library throughout that time. Mr.
13 Pace spent those years teaching himself how to do law
14 which he --

15 JUSTICE SCALIA: -- take a whole lot to figure
16 out that you have a claim where your lawyer told you --
17 you weren't going up for life and it turned out you were
18 sent up for life.

19 MR. WYCOFF: In fact --

20 JUSTICE SCALIA: I mean, what does it take if --
21 can a 17-year-old figure that something has gone wrong
22 here?

23 MR. WYCOFF: Well, in fact, that -- that claim
24 was litigated -- litigated in the first petition, and in
25 fact, he didn't think of that. If you look at his pro se

1 PCHA petition, he didn't know that was a claim. It's a --
2 it's a form that he filled out and handed in and appointed
3 counsel came up with that claim in the first post-
4 conviction proceeding.

5 This is much more complex than that. If you
6 look at his briefs, which are in the joint appendix,
7 Pennsylvania had a very complex system of law here where
8 they had statutory bar rules but they had judicial
9 exceptions to those rules. And it's not an easy matter
10 for someone to figure that out.

11 Mr. Pace educated himself. Just compare the pro
12 se pleading filed in 1992 to what he filed in 1996, and
13 you can see what he did during these 4 years.

14 The other -- the other -- just -- my light is
15 on, but just the other things I'd like to mention about
16 that are that keep in mind, during this time there were no
17 time limits on filing in either State or Federal court.
18 The commonwealth has never alleged any prejudice from this
19 time, and there's never been any allegation that Mr. Pace
20 acted in bad faith and with any -- any intent to delay.
21 In fact, this is someone who wanted to get his claims
22 heard, wanted to figure out how to do it right, and did
23 figure out how to do it right in the end.

24 I would like to reserve the rest of my time.

25 JUSTICE STEVENS: You may.

1 MR. WYCOFF: Thank you.

2 JUSTICE STEVENS: Mr. Eisenberg.

3 ORAL ARGUMENT OF RONALD EISENBERG

4 ON BEHALF OF THE RESPONDENT

5 MR. EISENBERG: Justice Stevens, and may it
6 please the Court:

7 I'd like to address the structure of the
8 Pennsylvania filing deadlines for post-conviction review
9 because I think they shed some light and need some
10 discussion here.

11 What Pennsylvania did was to establish a 1-
12 year, flat time limit that applies to everybody. 1 year
13 from conviction. It's automatic. It doesn't matter what
14 the nature of your claims are. It doesn't matter when you
15 discovered your claim. In order to comply with that time
16 limit, all you have to do is file a post-conviction
17 petition within 1 year of finality.

18 The rest of the statute is essentially a
19 separate set of filing deadlines for petitioners, for
20 successive petitioners, for people who either have already
21 had one round of post-conviction review or who haven't
22 bothered to pursue it. Those people, said the
23 legislature, are only going to be entitled to further
24 post-conviction review, to additional rounds of post-
25 conviction review if they fall into a particular class of

1 claim that couldn't have been raised earlier. And -- and
2 the legislature identified three classes that mirror the
3 three provisions in the Federal statute of limitations.
4 And if the petitioner falls within any of those classes,
5 he then has 60 days from the time that that claim arose in
6 order to come into court.

7 Now, if a petitioner files a post-conviction
8 petition and he's within a year of finality, those so-
9 called exceptions don't come into play. They don't apply.
10 He doesn't need to meet them. Those are for the second
11 petitioner.

12 So what Pennsylvania really has is a two-level
13 system of statutes of -- of filing limitations. And of
14 course, in order for the court to determine whether the
15 petitioner has met the filing deadline, he has to look at
16 these three classes for someone who has passed 1 year from
17 finality. That's not an exception in the way I think that
18 the petitioner and some of the lower courts have used the
19 term at all. These are simply different kinds of filing
20 limits. And of course, the court has to look at the
21 statute and the nature of the claims to see whether review
22 is available and to see whether the petitioner has sought
23 review within the proper time.

24 Nothing about that system makes those so-called
25 exceptions not time limits. They're still time limits,

1 and if you don't file in time and come within one of those
2 classes, then the second petition, successive petition
3 time limits don't apply to you and you're out of time.

4 JUSTICE KENNEDY: Well, but if we accept your
5 position, it seems to me that the State prisoners are
6 going to have to go once to Federal court and then they're
7 -- they're going to run into an exhaustion requirement.

8 MR. EISENBERG: Well, they're not going to run
9 into an exhaustion requirement, Your Honor, because if
10 they've already been through one round of State post-
11 conviction review, then they are unlikely to be able to
12 exhaust more claims because there's a -- there's a --

13 JUSTICE KENNEDY: Well, we're --

14 MR. EISENBERG: -- 1-year time limit.

15 JUSTICE KENNEDY: -- we're assuming a late-
16 discovered claim that's within AEDPA.

17 MR. EISENBERG: That's right. And so the
18 question is whether -- and what petitioner is really
19 saying is that the AEDPA 1-year time limit should be
20 suspended essentially indefinitely as long as the
21 petitioner wants to argue that he may have some late-
22 discovered claim in State court.

23 JUSTICE BREYER: It -- it's my -- I still have a
24 feeling that this is a limited universe. Now, my reason
25 for thinking that is that the Federal statute says you

1 have to file within a year of -- and then it lists four
2 dates. And the middle two are special new cases, unusual
3 probably. The first one and the fourth one are the
4 important ones. The first one is final in the State
5 courts, your first round, and the fourth one is newly
6 discovered evidence.

7 Now, my guess is most States also allow you for
8 collateral -- to file collateral relief in those two
9 circumstances. And in most States probably you get nearly
10 a year from the same kind of event. So if you go after
11 the year, you're out of luck in Federal court. If you're
12 within the year, you're probably okay for the State. But
13 there are a few States that have -- maybe Pennsylvania --
14 just 60 days from one of the events, newly discovered
15 evidence, but a year for the Federal. So we're talking
16 about people who file between 2 and 12 months. That --
17 that must be a pretty limited class.

18 MR. EISENBERG: It's -- it's not, Your Honor.

19 JUSTICE BREYER: It's not?

20 MR. EISENBERG: And -- and the reason that it's
21 not --

22 JUSTICE BREYER: But have I got it right? Have
23 I got this complicated thing right?

24 MR. EISENBERG: Only -- it's -- that is true
25 only for successive petitioners. For people who aren't

1 satisfied with the round of direct appeal and a round of
2 first -- of post-conviction review in State court. And so
3 the question is whether the Federal statute should be
4 interpreted in a way that essentially writes off the
5 State's time requirements for the successive petitioner so
6 that we can make sure that the successive petitioner can
7 exhaust whatever new claims he wants to come up with in
8 State court before he comes to Federal Circuit.

9 JUSTICE BREYER: Now, let's --

10 JUSTICE KENNEDY: What do I do it in a State
11 where there is a plausible close question of whether or
12 not the successive petition is barred in the State court?
13 And I interrupted Justice Breyer, but I -- I think it's
14 along the same line.

15 MR. EISENBERG: The -- the general rule -- and
16 this is implicit I think in the fact that Congress passed
17 a statute of limitations. The general rule is that the
18 petitioner is entitled to whatever he automatically gets
19 in State court in order to exhaust a universe of claims,
20 not all possible claims, but whatever claims can be
21 exhausted within those guaranteed rounds of review. At
22 that point, he should go to Federal court.

23 If new claims arise after that, then Congress
24 specifically provided for them in the second and
25 successive petition procedure that it has in the Federal

1 statute.

2 The way that would interact --

3 JUSTICE KENNEDY: But no -- there's still an
4 exhaustion requirement.

5 MR. EISENBERG: The way that would interact with
6 -- for exhaustion purposes with a State like Pennsylvania
7 is this. The petitioner finishes his direct review. He
8 finishes his post-conviction review. He has a set of
9 clearly exhausted claims. He files a fully exhausted
10 petition in Federal court. No *Rose v. Lundy* problem. If
11 a new claim arises at that point, then he has to go to
12 State court and try to exhaust that claim in State court.
13 He can do that while a Federal petition is pending or even
14 after a first Federal petition has already been disposed
15 of. In fact, he may have to because the claim may not
16 arise before the end of litigation in Federal court.

17 When he gets to State court, he's either going
18 to be deemed timely or not. Actually the fact that we
19 have a 60-day time limit as opposed to a whole year helps
20 him because it helps make it clear to him that he's got to
21 come to State court at a point where he's really got a
22 long time left to deal with Federal court because he's
23 going to --

24 JUSTICE SOUTER: But isn't there a wrinkle to
25 this? Isn't the wrinkle that even in cases in which you

1 and I might say patently he's going to be out of time if
2 he goes back to Federal court, the Third Circuit is
3 requiring him to go there anyway, go through the formality
4 of formal exhaustion, if you will, before they'll consider
5 it? And isn't that a basis at least for equitable
6 tolling?

7 MR. EISENBERG: With respect to your argument,
8 the answer is absolutely not. First of all, as you have
9 just observed, that's really an argument that goes to
10 equitable tolling. Even petitioner doesn't bring in the
11 Third Circuit law with respect to statutory tolling, with
12 respect to understanding the -- the language of the
13 statute.

14 As to equitable tolling, however, the factual
15 premise is wrong. It's not true that the Third Circuit
16 forces the defendant to go back to State court no matter
17 what. In fact --

18 JUSTICE SOUTER: Okay. Help me -- help me out
19 here because I -- I just don't remember well enough. I
20 thought that's what Judge Giles was getting at when he
21 said, you know, he would have been thrown if he hadn't
22 gone through the State procedure. So help me out. Is
23 that what he was getting at or not?

24 MR. EISENBERG: That is what he was getting at
25 but at a limited point in time, and the whole question for

1 equitable tolling purposes was at what point in time.
2 Nobody argues that the Third Circuit still is making
3 everybody go back and do it no matter what.

4 What the petitioner argued was that the Third
5 Circuit case law, as of 1997 when he was first starting
6 his second round of post-conviction review in State court,
7 as of that time, he says, the Third Circuit case law said
8 you have to go back no matter what even though
9 Pennsylvania has a -- this new statute of limitations.

10 That's not what the Third Circuit says, though.
11 And all the cases that the petitioner relies on primarily
12 -- he cites a -- a case called Doctor, a case called
13 Banks, a case called Lambert. All of those cases were
14 decided before the Pennsylvania courts began applying the
15 new jurisdictional time bar in State court.

16 JUSTICE SOUTER: If that means the petitioner
17 was wrong, doesn't it also mean that Judge Giles is wrong,
18 and if Judge Giles can't figure it out, isn't there a
19 pretty good argument that the petitioner ought to get
20 equitable tolling?

21 MR. EISENBERG: Well, there are a number of
22 problems with the equitable tolling, Your Honor. But even
23 taking that main one, that the petitioner made a mistake
24 of law, that he didn't figure out correctly whether he was
25 supposed to go back to State court, even on that point,

1 Your Honor, that's not grounds for equitable tolling. You
2 take a risk when you make a legal argument that it will
3 fail. This legal argument was controlled entirely by
4 State law, and what the Third Circuit, as opposed to Judge
5 Giles who was reversed by the Third Circuit said, is that
6 you have to look back to State law.

7 What the Third Circuit has said -- and the --
8 one of the cases cited in our brief at page 49 is Walker
9 v. Frank. Chief Judge Becker said no, we're not going to
10 give equitable tolling to these defendants because at the
11 very latest -- at the very latest -- they had to know by
12 December of 1997 that they were going to be time-barred in
13 State court. This petitioner filed --

14 JUSTICE SOUTER: But -- but Judge Giles didn't
15 understand it either.

16 MR. EISENBERG: Judge Giles didn't say that --
17 that the State law would never in the future be applied to
18 these defendants. He said at this early time it was still
19 unclear whether it would be applied.

20 JUSTICE SOUTER: So far as this case is
21 concerned, yes. And -- and so if Judge Giles got it
22 wrong, isn't there a pretty good argument for equitable
23 tolling when the petitioner gets it wrong?

24 MR. EISENBERG: What there is is an argument
25 that he had an argument to make in Federal court that he

1 was not -- that he was still going to have the opportunity
2 to go back to State court.

3 But the problem is that Federal courts can't
4 decide for the States how their time bars are going to be
5 applied. And if instead they said --

6 JUSTICE SOUTER: But -- but this argument is not
7 trying to decide for the States. This argument basically
8 is if nobody can figure it out, including a Federal
9 district judge, at least give me the benefit of the doubt
10 with equitable tolling.

11 MR. EISENBERG: It's not true that nobody could
12 figure it out, Your Honor. In fact, all the cases that
13 the petitioner cites in his brief from Federal district
14 court judges who were sending defendants back to State
15 court during this period because they said, well, maybe
16 you'll get exhaustion anyway, maybe you'll be able to
17 exhaust claims, of those cases that are cited in the
18 brief, most of them are from the same one judge who kept
19 saying the same thing over and over. Several of the other
20 cases didn't even talk about the State time bar, and at
21 that same period of time, there were other district judges
22 who weren't sending defendants back, who were saying
23 there's a new State time bar, you're barred in State
24 court, and therefore, if you want to raise this claim in
25 Federal court, you can, but you face procedural default.

1 JUSTICE SOUTER: But if he had gone into the
2 Federal court he went into, and he had not gone through
3 this State procedure, he would have been turfed out.

4 MR. EISENBERG: You can't get equitable tolling,
5 Your Honor, our position would be --

6 JUSTICE SOUTER: Well, answer that question --

7 MR. EISENBERG: I'm sorry.

8 JUSTICE SOUTER: -- before you tell me what the
9 consequence is.

10 MR. EISENBERG: No. That's what Judge Giles
11 said many years after the fact. Do we know that's what
12 Judge Giles would have ruled at the time? Perhaps. But
13 there are other judges, Federal judges, who were ruling
14 otherwise at the time, and the Third Circuit --

15 JUSTICE SOUTER: Well, I mean, don't -- don't we
16 have to take Judge Giles' statement as being a statement
17 in good faith unless there is a pretty darned good reason
18 not to?

19 MR. EISENBERG: The point is, Your Honor, that
20 that's not the test for equitable tolling. There are all
21 sorts of arguments that a defendant can make about why the
22 law is unclear. It wouldn't have had to depend on the
23 Federal court's understanding of this particular State
24 law. A defendant could come along and he could say, well,
25 I'm unclear about the application of (d)(2). I've got

1 circuits like the Ninth Circuit who tell me that even if
2 my petition is blatantly untimely in State court, it still
3 tolls. I filed, knowing I was untimely in State court,
4 because the Ninth Circuit tells me that I'm still going to
5 get tolling, and now you tell me I'm not going to get
6 tolling?

7 JUSTICE BREYER: All right. Let's suppose to
8 get away from it -- can I go -- are you finished with
9 equitable tolling because I want to go back to --

10 MR. EISENBERG: Well, I -- I have -- there are
11 some -- really some -- some threshold problems with
12 equitable tolling that --

13 JUSTICE BREYER: I -- I have a general question
14 which is not Pennsylvania. I've looked up or got a rough
15 idea of the statute of limitations for a first petition in
16 many States, and most of them are a year or more. So
17 there's no problem. But 11 have less than a year, and in
18 particular, Oklahoma has 3 months apparently. And
19 Oklahoma is -- a lot of death cases come out of Oklahoma.
20 So what rule would -- where I have to have -- I focus on
21 Oklahoma for the reason that I think this has bite only in
22 death cases because I don't see why anybody would want to
23 abuse the system except in a death case. But there are a
24 lot there.

25 Now, am I supposed to say in Oklahoma which has

1 the 90 days but exceptions, that where somebody has filed
2 a petition in State court, let's say, on the 180th day,
3 and he thinks an exception applies, is he supposed to also
4 run to Federal court and file a protective petition which
5 could well have been dismissed on exhaustion grounds?
6 What's he supposed to do and how is he supposed to know
7 what to do?

8 And one system that might work is Justice
9 Scalia's idea.

10 MR. EISENBERG: Well, it's --

11 JUSTICE BREYER: Another that might work is --
12 is requiring in death cases that it be a -- a plausible
13 ground or something like that. I want to know your
14 opinion of how to deal with that circumstance.

15 MR. EISENBERG: It certainly shouldn't be a
16 plausible ground test, and even the petitioner agrees with
17 that position, Your Honor.

18 And it certainly would work if we adopted, as I
19 think Congress did, a system like the one that Justice
20 Scalia spelled out because then the defendant knows.

21 And I'd like to get back, as I was discussing
22 with Justice Kennedy, to what the defendant knows. He
23 knows that if he's outside the time that he's guaranteed
24 automatic review, whether direct appeal or State review,
25 State post-conviction review, that his chances of

1 exhausting more claims in State court --

2 JUSTICE BREYER: Actually most prisoners are not
3 represented, I don't think, at this stage. They -- they
4 haven't a clue about the word exhaustion, and they haven't
5 a clue about the statute of limitations. So they file a
6 -- a paper in -- in the State court, and they say this
7 roughly is what my problem is. Is that what happens, or
8 are they all quite educated?

9 MR. EISENBERG: Your Honor, the -- the Congress
10 that passed this statute of limitations is the same
11 Congress that made the decision about whether habeas
12 petitioners would be appointed counsel or not. So to say
13 that we can't really apply the statute of limitations
14 because it would be unfair as to those petitioners who are
15 unrepresented would be essentially to undercut the statute
16 of limitations --

17 JUSTICE BREYER: I'm trying to get from you what
18 is your opinion of a practical approach to this problem in
19 Oklahoma, say.

20 MR. EISENBERG: The practical approach to the
21 problem is to look at the statute that says you have a
22 year. If you file your petition within that year,
23 whatever you've got at the end of that year, you can take
24 to Federal court and be confident that it's exhausted. If
25 you want to do something after that year, you can't be

1 confident anymore. All you have to do is -- is count a
2 year.

3 Now, if something comes up after that time,
4 you're supposed to go to State court first, even if you've
5 got something in Federal court. This statute of
6 limitations isn't supposed to be interpreted in order to
7 make the Federal successive petitions standard moot and
8 unnecessary. It exists for a reason. So if a -- if a
9 claim arises at a later point, after you have finished
10 your guaranteed review in State court, go back to State
11 court, whether or not you've got something pending in
12 Federal court. Don't put that new claim in with your old
13 claims in Federal court because then you have a mixed
14 petition. If you get exhaustion in State court, whether
15 you're timely or untimely, you're going to exhaust. You
16 can then go back to Federal court with a request for a
17 successive petition. It -- that's what you have to do and
18 that's appropriate because that's how Congress set up the
19 statute, with the 1-year filing deadline and -- and a
20 provision for successive petitions.

21 JUSTICE STEVENS: May I ask how you would handle
22 a case that is a successive petition, a late -- a recently
23 found claim, and the -- filed beyond the statute of
24 limitations but the State has three exceptions to the
25 statute, but it does not require that the -- the

1 petitioner identify the exception in the petition? It
2 just allows it for the judge to decide. Would there be
3 tolling during the period in which the judge decided
4 whether or not the petition was timely in your view?

5 MR. EISENBERG: No, Your Honor, because all the
6 court is doing is deciding whether the time bar applies,
7 and in order -- in a State that has those kind of
8 categories, what the court is, in effect, doing is
9 deciding what kind of time limit applies to this
10 particular petition.

11 JUSTICE STEVENS: And even if it takes a year or
12 so to make that decision, you'd say no tolling.

13 MR. EISENBERG: Your Honor, that's really true
14 of every kind of statute of limitations issue that can
15 come up. Take away those three exceptions. Just have the
16 1-year flat time bar. Does that mean that the State court
17 isn't going to have to take some time to look at it and
18 decide? What if there's a prisoner mailbox question?
19 What if there's an amendment question of the type that
20 this Court just granted cert on last month in *Mayle v.*

21 *Felix*? What if there's a question about how to compute --

22 JUSTICE STEVENS: And in all of those questions,
23 you'd say there would be no tolling in order to find out
24 whether it was timely or not.

25 MR. EISENBERG: That's right because during that

1 time, the State court is deciding on timeliness, and if
2 it's untimely, it was untimely as of the point of filing.
3 That's what makes it a filing requirement. You take your
4 claim and you file it --

5 JUSTICE STEVENS: But what about the reasoning
6 in Artuz that the application was -- if it turns out later
7 it was timely, it would have been properly filed?

8 MR. EISENBERG: I'm sorry. I -- I think I
9 understand Artuz to have said that if the application was
10 untimely, then it was not properly filed and it was not
11 properly filed from the get-go, Your Honor.

12 The question that was reserved in Artuz is
13 whether something about exceptions changes that statement
14 in Artuz. And my response is that certainly nothing about
15 the kind of exceptions that were present in this case
16 changed the response.

17 JUSTICE STEVENS: No, but if I understand you
18 correctly, you're saying that even if it takes the judge 6
19 months to decide whether it was timely, if he ends up with
20 the conclusion that it was not timely, there would be no
21 tolling for that 6-month period.

22 MR. EISENBERG: That's correct, Your Honor.

23 Now, in Pennsylvania, of course, all you have to
24 do to be timely is file within the 1 year. And whatever
25 you've exhausted is done.

1 That -- I'd like to go from that into expanding
2 more on the equitable tolling because I think that that
3 plays in here. This defendant had two rounds. The first
4 round was 4 years, not even just 3, but I believe closer
5 to 4 years before there was a filing deadline in either
6 State court or Federal court. Now, when you decide to
7 wait -- he didn't have a filing deadline, but when you
8 decide to wait, you take your chances. There's a rule
9 that's even more immutable than time limits or
10 jurisdiction, and it is that things change. When you
11 wait, you take the risk that your evidence may change, the
12 facts may change, the law may change. That's what
13 happened to this defendant while he sat and did nothing.

14 He says he was learning the law during that
15 period. Well, then would it -- is it just 4 years? What
16 if it had taken him 8 years or 12 years to learn the law?
17 He had the filing deadline that came up. He never claimed
18 that he didn't understand what it was. He could have
19 beaten any of those filing deadlines in State or Federal
20 court. He says, I have no incentive for delay. I'm not a
21 capital defendant. All I wanted was a speedy resolution
22 of my claims. But in that case, he didn't need a filing
23 deadline to make himself come to court.

24 The fact is that there are thousands of cases in
25 which noncapital defendants file these kinds of late

1 petitions, and the State courts are trying to deal with
2 them. And this is the way that Pennsylvania chose to try
3 to deal with the problem in State court, in its State
4 courts, not just for capital cases, but for noncapital
5 cases.

6 JUSTICE SCALIA: Why -- why are there thousands
7 of cases in which noncapital defendants file this type of
8 case? What -- what incentives do noncapital defendants
9 have to drag it on?

10 MR. EISENBERG: The incentive that they have to
11 drag it on is that they may come up with a new legal
12 theory that attracts a -- a court that they didn't present
13 before, that new facts may come up, may arise that they
14 try to argue. That's what this defendant did, although
15 they weren't really new. They were facts that were
16 available to him as of the -- the day of his guilty plea
17 in 1986. He claimed that they were new. And if there's
18 no cost to doing that, if in fact there may be a benefit
19 to doing that, then why not? If --

20 JUSTICE KENNEDY: It seems -- it seems intuitive
21 also that the prosecution's witnesses will be difficult to
22 locate and so forth. Has -- has there been anything
23 written about that, about prejudice to the prosecution
24 from -- from delay, or is it just something we --

25 MR. EISENBERG: Well, it's certainly something

1 that --

2 JUSTICE KENNEDY: -- we take judicial notice of?

3 MR. EISENBERG: It's certainly something that
4 any prosecutor would tell you, Your Honor.

5 This -- this crime occurred 20 years ago in
6 1985. And this was a relatively simple case. A police
7 officer came on to the scene while the defendant was
8 bashing the head of the victim with a nightstick. But
9 even in a simple case, you're going to have problems of
10 proof, and the party with the primary problems of proof is
11 the party with the burden of proof, and that's the
12 prosecution. So, of course, there's going to be a problem
13 for the prosecution, and that's why we adopt -- one of the
14 reasons that we adopt this kind time limit.

15 Even once the petitioner did come back to State
16 court, though, Your Honor -- and this gets back to the
17 questions that Justice O'Connor was raising initially --
18 he raised essentially the same claims. He says, well,
19 this time around, I put them in a different guise,
20 different facts in support of my claim about my guilty
21 plea, different legal labels. Yes, but all in the context
22 of -- of ineffective assistance because the only way he
23 could get into court a second time for a second round of
24 post-conviction review in Pennsylvania was to say that my
25 lawyer at my first round of State post-conviction review

1 was ineffective. He didn't attach these affidavits from
2 my mother and father. He didn't call it due process
3 instead of whatever else he called it.

4 Now, petitioner could make those --

5 JUSTICE SOUTER: Well, he also raised an -- an
6 entirely different claim, didn't he? I mean, it goes to
7 ultimately the same point, but he raised the claim that
8 the court had not engaged in an adequate colloquy --

9 MR. EISENBERG: The reason the colloquy wasn't
10 adequate is precisely for the same reason that he was
11 attacking his lawyers, in the petitioner's view, that it
12 didn't explain to him the meaning of a life sentence.

13 JUSTICE SOUTER: Right. But that -- the -- I
14 mean, it's a different claim. The judge has an
15 independent responsibility. It's not the lawyer's
16 responsibility.

17 MR. EISENBERG: Your Honor, that's a claim that
18 was waived if it was not presented in the first --

19 JUSTICE SOUTER: That -- that may be, but it is
20 a different claim.

21 MR. EISENBERG: But -- but --

22 JUSTICE SOUTER: It is not the claim of
23 ineffective assistance.

24 MR. EISENBERG: But the only way that the
25 petitioner could exhaust that claim in State court on a

1 second round of post-conviction review would be to put it
2 in terms of ineffective assistance of first post-
3 conviction counsel. And, of course, he can't then take
4 that claim and come to Federal court because claims of the
5 ineffectiveness of post-conviction counsel are not
6 cognizable on Federal habeas review.

7 So not only did he wait 4 years when he had no
8 filing deadline impediments to come to court, but he then
9 raised in State court claims that he couldn't have turned
10 into exhausted Federal claims anyway in order to add to
11 what was available to him, to the universe of claims that
12 were available to him after his initial round of State
13 post-conviction review.

14 And we're talking about equitable tolling for
15 somebody who only has a problem because of his own
16 inaction for 4 years and who even then spent another 3
17 years in State court on claims that he couldn't bring to
18 State court, and even then, in the face of developing
19 State law about the time bar, refused to look at it. So
20 not only did we have a statute that says you're in
21 trouble, you're time-barred now --

22 JUSTICE STEVENS: Just as a matter of curiosity,
23 is the transcript of the plea colloquy still available?

24 MR. EISENBERG: Yes, Your Honor. It's in the
25 appendix. And what the judge --

1 JUSTICE STEVENS: And was there the
2 constitutional violation he alleges?

3 MR. EISENBERG: What the judge said three times
4 is, you understand that your sentence will be life, and
5 the petitioner said yes each time.

6 Now, his claim later on -- and he's right. He
7 didn't think that was his claim when he filed his first
8 post-conviction review petition in 1986. He just thought
9 his claim was that his plea was involuntary. Once he got
10 counsel appointed, it turned out that his claim was, oh,
11 my lawyer didn't specifically -- neither my lawyer nor the
12 judge specifically told me that by life they meant life as
13 opposed to something less than life.

14 JUSTICE STEVENS: The irony of this whole
15 proceeding is it seems to me it would be a lot easier to
16 decide the merits of that claim if the transcript is
17 available than to get into all these issues --

18 MR. EISENBERG: Well, but, Your Honor --

19 JUSTICE STEVENS: -- we have today.

20 MR. EISENBERG: I'm sorry.

21 That's what happened. That claim was litigated
22 on the first round of post-conviction review and the State
23 courts rejected it because of the transcript of the
24 colloquy. The defendant could have taken that claim to
25 Federal court in 1992. He just didn't. Now --

1 JUSTICE STEVENS: Of course, he's a 17-year-old
2 without any learning in the law. He probably didn't
3 realize there's any requirement that these things have to
4 appear in the transcript. I mean, that's understandable.

5 MR. EISENBERG: He -- he knew it appeared in the
6 transcript. That was the basis of his claim in -- on
7 State post-conviction review. He had not one but two
8 lawyers appointed for that review and he litigated it on
9 up through the State highest court.

10 But even when he came back in 1996, he knew the
11 statute was there. He's never claimed he was confused by
12 the new time bar. He says, I thought I would get some
13 exceptions to it. But then the State court came and said,
14 no, it's jurisdictional, no exceptions. Defendant didn't
15 do anything. It was 1997, still 2 years before he filed
16 in Federal court. Didn't take note of that State -- he
17 took note of it. He acknowledges in his pleadings that he
18 knew about it, but he decided not to go to Federal court
19 anyway.

20 More -- more cases come out from the State
21 courts, even the decision in his own court -- in his own
22 case from the State's highest court. Even when we get to
23 July of 1999 and the State supreme court denies review on
24 the timeliness question in his own case, the petitioner
25 says, even then how was I supposed to know that I wasn't

1 going to get some kind of exception to the State time bar?
2 I didn't know that until the next month when another case
3 came out from the State supreme court. This was the third
4 or the fourth from the State supreme court in somebody
5 else's case. Only then in August of 1999 did I finally
6 know that I was time-barred, meaning I knew then that I
7 had never been getting any tolling, that for the last 3
8 years, I didn't have 1 day of tolling on my Federal
9 claims.

10 And at that point did he then go to Federal
11 court? Even then he didn't. Even in August 1999 when the
12 petitioner says, finally I know that I've been out of luck
13 for the last 3 years, that I'm 3 years late to Federal
14 court, does he rush in then? No. He waits another 5
15 months after August of 1999 to finally come to Federal
16 court and say here's my petition, here's the claims that
17 I've been working on and that I have litigated in State
18 court.

19 That's not equitable tolling, Your Honor. It's
20 not equitable tolling under the circumstances of the
21 specific circumstances of this case, and it's not
22 equitable tolling in general when a petitioner claims
23 essentially I have a mistake of law, I thought that I
24 would win, I knew there were arguments against me, I knew
25 I might lose those arguments, but I really thought I could

1 win, and therefore you should give me equitable tolling
2 while I pursue them.

3 JUSTICE STEVENS: Thank you, Mr. Eisenberg.

4 MR. EISENBERG: Thank you very much.

5 JUSTICE STEVENS: Mr. Wycoff, you have about 4
6 minutes left.

7 REBUTTAL ARGUMENT OF DAVID WYCOFF

8 ON BEHALF OF THE PETITIONER

9 MR. WYCOFF: Several things. First of all, the
10 respondent said that in the second petition Mr. Pace only
11 presented State law, ineffective assistance of post-
12 conviction claims, which are not Federal claims. That's
13 absolutely not true. He presented the ineffective
14 assistance of post-conviction counsel as a waiver-
15 overcoming mechanism not as a substantive claim for
16 relief. The substantive claims were due process claim,
17 ineffective assistance of counsel, and new facts which
18 needed to be exhausted under Third Circuit exhaustion law.

19 Second, respondent suggested and -- and the
20 Third Circuit also suggested that State law somehow became
21 clear in mid-December 1997 when the Superior Court, which
22 is Pennsylvania's intermediate court, decided a case
23 called Alcorn. Alcorn was the first case to apply the
24 time bar. But the Third Circuit itself, after Alcorn in
25 the Lambert case, held that the -- the statutory language

1 of the time bar is not dispositive and you have to exhaust
2 even if you don't meet one of the statutory exceptions
3 because the court may fashion judicial exceptions just
4 like they did for all the other procedural bar rules.

5 In fact, Pennsylvania in the Lambert case, in
6 their opposition to the certiorari petition in May of
7 1998, said that that's a correct statement of Pennsylvania
8 law, that there are judicially created exceptions,
9 including the miscarriage of justice exception which will
10 probably apply to the time bar, just like they applied to
11 the other statutory bars.

12 So Alcorn did not, even if it could have, since
13 it's an intermediate court, it did not clear up the state
14 of the law. The law did not become clear as to the
15 specific things that Mr. Pace alleged, which is the
16 miscarriage of justice exception under Pennsylvania law
17 and the illegal sentence exception, judicially created
18 exceptions to bar, were not rejected by the Pennsylvania
19 Supreme Court until July of -- I'm sorry -- August of
20 1999, which is -- by that time Mr. Pace was already out of
21 State court so those -- the law became clear in State
22 court after he was already done litigating.

23 The Third Circuit did not actually find the
24 statutory language of the PCRA time bar dispositive of the
25 exhaustion question until March of 2000. The district

1 courts, not just Judge Giles, Chief Judge Giles' 20 years
2 experience on the bench, not just him, lots of district
3 courts send people back to exhaust during this same time
4 period.

5 State law was unclear. State law appeared to
6 provide remedies and possible merits review. Because the
7 State law was unclear, Third Circuit exhaustion law
8 required petitioners like Mr. Pace to go back and exhaust.
9 And he did exactly what the circuit law required of him.
10 As a matter of equity, the court cannot punish someone. A
11 Federal court can't say, do X, and then after that person
12 does it, say, sorry, you're out of court. It's not fair
13 and it shouldn't happen here.

14 As to statutory tolling, I just want to -- the
15 -- the Court I think can just easily decide this case just
16 by reaffirming the central holding of Artuz which is when
17 a State court allows you to file, gives your filing
18 judicial review, applies a bar rule on a claim-by-claim
19 basis, that was a condition to obtaining relief on claims
20 in the petition. It's not a condition to filing the
21 petition itself. And if the State court eventually holds
22 all your claims are barred, as they did in Artuz, the
23 petition is, nevertheless, properly filed and should toll
24 AEDPA's statutory -- under AEDPA's statutory tolling
25 provisions.

1 If there are no further questions.

2 JUSTICE STEVENS: Thank you, Mr. Wycoff.

3 The case is submitted.

4 (Whereupon, at 12:00 p.m., the case in the
5 above-entitled matter was submitted.)